Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Inquiry Concerning the Deployment of	**)**	
Advanced Telecommunications Capability	**)**	**GN Docket 04-54**
To All Americans in a Reasonably Timely	**)**	
Fashion, and Possible Steps to Accelerate	**)**	
Such Deployment Pursuant to Section 706	**)**	
Of the Telecommunications Act of 1996	**)**	

REPLY COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION INTERGOVERNMENTAL ADVISORY COMMITTEE

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INTRODUCTION AND SUMMARY

The Commission has requested comments in response to a *Notice of Inquiry* that was released on March 17, 2004.[1] The specific request seeks "comment on various market, investment, and technological trends in order for the Commission to analyze and assess whether infrastructure capable of supporting advance services is being made available to all Americans."[2] The Commission, in the *Notice of Inquiry*, specifically noted its desire for comments of the Intergovernmental Advisory Committee (IAC) that could provide guidance on issues important to tribal, state and local governments such as whether the Commission should take steps to abate allegedly abusive rights-of-way practices which negatively impact the deployment of broadband networks.[3]

On the question of how tribal, state or local regulation of rights-of-way impacts the deployment of advanced telecommunications services, the IAC reasserts and incorporates by reference the previous position of the Local State Government Advisory Committee (LSGAC) on the issue.[4]

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[1] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry, GN Docket No. 04-54, FCC 04-55 (rel. March 17, 2004); 69 Fed. Reg. 18508-18515 (April 8, 2004) (hereafter *"Notice of Inquiry"*);

[2] Notice of Inquiry, ¶ 1.

[3] *Notice of Inquiry*, ¶38. ("Further, the Commission's Intergovernmental Advisory Committee, formerly known as the Local Government Advisory Committee (LSGAC), provides guidance to the Commission on issues of importance to state, local and tribal governments, including local rights-of-way matters.") *see also, FCC Nominations for Membership on Intergovernmental Advisory Committee, formerly known as the Local and State Government Advisory Committee,* Public Notice, 18 FCC Rcd 18071 (2003).

[4] *See* LSGAC Archives, http//www.fcc.gov/statelocal/recommendations.html, No. 23, *Regarding state and local government right of way regulations and compensation requirements. Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98*; No. 24, *Recommending that the Commission defer to the expertise of national associations representing local government in developing right of way management guidelines or practices. Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217,CC Docket No. 96-98* (last accessed May 22, 2004).

From the Commission's *Notice of Inquiry*, the IAC understands that the National Association of Regulatory Utility Commissioners (NARUC) has issued a white paper report[5] urging the Commission to include a section within this fourth 706 report that addresses whether steps should be taken to abate rights-of-way management practices by tribal, state and local governments.[6] However, the work of one NARUC study group on this issue has never been formally adopted by NARUC.

The IAC does not believe that management of rights-of-way by tribal, state and local governments is a barrier to investment, nor a barrier to entry, for providers of advanced telecommunications services. Indeed, the fact that these governments make rights-of-way available for use should induce investment. If these governments did not make rights-of-way available, providers of advanced telecommunications services would be required to negotiate with literally tens of thousands of individual property owners in order to deploy the most basic facilities. Additionally, without tribal, state and local governments' oversight and regulation of the publics' rights of way, those governments would be failing their citizenry as industry's unfettered use of the same could easily focus upon the needs of a single industry and not of the public as a whole. The Commission should note that these governments are large consumers of these services and it is certainly in their interests to facilitate their deployment, as well as gaining the economic benefits of having these services available to their citizens.

The IAC notes that management of tribal, state and local rights-of-way is really an issue for these governments to resolve and not the Commission. In fact, these governments have managed rights-of-way for decades and have supported the development of other public industries and utilities such as water, sewer, electric, cable, and telephone service. The Commission's earlier acknowledgment that it does not have jurisdiction over these issues, except perhaps in an extremely narrow situation, should be reaffirmed.

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[5] *Promoting Broadband Access Through Public Rights-of-Way and Public Lands :2002 NARUC Summer Meetings in Portland Oregon* (rel. July 31, 2002), http://www.naruc.org/displayindustryarticle.cfm?articlenbr=18075 (last accessed May 22, 2004)(*hereafter* NARUC study).

[6] *Notice of Inquiry*, ¶38.

In addition, the IAC has reviewed the Comments filed by the National Association of Telecommunications Officers and Advisors (NATOA) and the Alliance for Community Media.[7] The IAC agrees with the main points raised in NATOA's filing.

I. RATIFICATION OF THE LSGAC COMMENTS ON THE USE OF RIGHT-OF-WAY

On August 23, 2000, the Local and State Government Advisory Committee (LSGAC) of the Commission submitted recommendations regarding the Commission's Notice of Proposed Rulemaking (NPRM), Notice of Inquiry (NOI) and Third Further Notice of Rule Making in WT Docket No. 99-217 and CC Docket No. 96-68.[8] These recommendations were ratified by the IAC during its meeting on May 14, 2004, and are incorporated by reference here. The following is an outline of the comments previously submitted to the Commission:

1. Tribal, state and local governments, like private-sector entities, own property and buildings. The property interests of these governments are parallel to those of private property owners[9] and cannot be taken without compensation. This constitutional principle applies even to the use of public rights-of-way for communications services.[10]

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[7] *Notice of Inquiry*, COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE ALLIANCE FOR COMMUNITY MEDIA (filed May 10, 2004); http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts (last accessed May 24, 2004).

[8] *See* LSGAC Archive Recommendations, http://www.fcc.gov/statelocal/recommendations.html, No. 23 and No. 24 (last accessed May 23, 2004).

[9] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428-429 (1982) (permanent occupation of even a small amount of property for cable television facilities constitutes a Fifth and Fourteenth Amendment Takings).

[10] St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99 (1893), The U.S. Supreme Court concluded that the permanent use of public rights-of-way by a communications company was nonetheless an action for which local government was entitled to compensation. ("... It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.") *Id.*

2. The Commission lacks jurisdiction to impose any rules that require access to public buildings or real property, and the Commission's authority over pole attachments[11] does not extend to facilities inside public buildings, to public buildings, or to public property in general.
3. Attempts by the Commission to force access to government property would not only implicate Fifth and Fourteenth Amendment Takings principles, but also raise Tenth Amendment federalism issues.
4. Since tribal, state and local governments already provide access to public property, nothing in the *Notice of Inquiry* supports the allegation there is any significant impediment to industries attempting to obtain investment dollars for advanced telecommunications services.
5. There are also practical reasons to leave public right-of-way issues to be addressed by tribal, state and local governments including, but not limited to:
    a. The Commission lacks expertise in regulating rights-of-way; Commission attempts to regulate rights-of-way would hamper tribal, state and local governments ability to do so;
    b. The LSGAC expressed concern that centralized regulation could lead to potential disasters as natural gas explosions, subterranean floods of retail space, disruption of water supplies, sewage systems and electrical facilities;
    c. Telecommunication providers attempt to invest in, or enter, markets without regard to local right-of-way policies or practices;
    d. Finally, the management of local rights-of-way has historically been a core function of tribal, state or local governments and not of the federal government.

For these reasons, as more completely outlined in the earlier LSGAC documents, the IAC suggests that the Commission take no actions as to tribal, state or local management of rights-

[11] 47 U.S.C. § 224.

of-way as it considers what reasons might impact investment concerns by the providers of advanced telecommunications services.

II. THE RECOMMENDATIONS OF A NARUC STUDY GROUP ON RIGHTS-OF-WAY ISSUES HAS NOT BEEN ADOPTED AS A RECOMMENDATION FOR NATIONAL POLICY.

Paragraph 39 of the *Notice of Inquiry* quoted a NARUC study which seemed to recommend the "development of national broadband principles and put forth model rights-of-way access rules."[12] The IAC wants the Commission to note that NARUC never adopted this study, its recommendations, nor any proposed model rules. The first page of the report notes that "*[t]he options listed within this report are the product of the Study Committee on Public Rights-of-Way and do not necessarily reflect the views of NARUC."*[13] Further, the study is based upon a review of only state legislation that addressed right-of-way access and was adopted after the Telecommunications Act of 1996.[14] The study fails to discuss statutes that have more general, but effective, means for the providers of advanced telecommunications services to challenge local regulation of rights-of-way.[15] This failure is more compelling because these statutes have been effectively utilized *at the local level* by the providers of telecommunications services to question allegedly unfair practices.[16]

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[12] *Notice of Inquiry* at ¶ 39.

[13] NARUC study at i.

[14] Pub. L. 104-104, 110 Stat. 56 (1996) (*hereafter* "1996 Act" or "TCA").

[15] *See, e.g.,* Ark. Code Ann. § 14-200-101 (a)(1)(A) & (b)(1) (West 2004):

> (a)(1)(A) Acting by ordinance or resolution of its council, board of directors, or commission, every city and town shall have jurisdiction to: . . . determine . . . all other terms and conditions, including a reasonable franchise fee, upon which the public utility may be permitted to occupy the streets, highways, or other public places within the municipality . . .
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> * * * * *
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> (b)(1) Any public utility affected by any such ordinance or resolution or any other party authorized to complain to the Arkansas Public Service Commission . . . may appeal the action of the council or commission by filing within twenty (20) days of receipt of notice of the ordinance or resolution by the utility's registered agent for service of process . . . a written complaint . . . .

[16] *See* General Telephone Co. of Southwest v. Lowe, 263 Ark. 727, 569 S.W.2d 71 (1978) (establishing the Public Service Commission's exclusive jurisdiction in Arkansas over telephone rates under old law); City

In summary, the NARUC study has not been adopted by any national organization, and it failed to consider the approaches taken by different tribal, state and local governments towards the management of public rights-of-way.[17] For these reasons, the IAC suggests that the Commission should give little weight to any conclusions of this study.

III. THERE IS NO SUPPORT THAT NON-FEDERAL REGULATION OF RIGHTS-OF-WAY IS A BARRIER TO INVESTMENT IN ADVANCED TELECOMMUNICATIONS SERVICES.

The *Notice of Inquiry* seeks comment on "the types of best practices that could help create reliable and reasonable expectations regarding management of the public rights-of-way that may help remove *barriers to investment* in advanced telecommunications services."[18] It is difficult for the IAC to suggest any potential best practices as requested by the *Notice of* Inquiry since there is no evidence that tribal, state and local management of rights-of-way has actually been a barrier to investment in advanced telecommunications services.

Testimony at recent hearings before the United States Senate Committee on Commerce, Science & Transportation suggests there are other reasons that providers of advanced

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of Little Rock v. AT&T Communications of the Southwest, 318 Ark. 616, 888 S.W.2d 290 (1994) (challenging the constitutional and statutory authority for a long distance telecommunications franchise fee).

[17] As noted in the study committee's report, its survey "focused on states that have enacted right-of-way access legislation since" the TCA. NARUC study at 1. Only 19 of the 50 states, no cities, and none of the tribal governments, were reviewed by the NARUC committee. *Id*.

The Commission asked commenters to discuss experiences in states where rights-of-way rules have been enacted, and cited among others, Fla. Statute, Section 337.401. The Florida statute has been in existence for several years. Deployment of advanced services in Florida, as elsewhere, have not occurred as quickly as state, local and tribal governments would have liked, but this has not been based on a provider's access to the rights-of-way, but on other circumstances facing the provider, including bankruptcy, access to capital, management practices, or marketing concerns. For example, for years AT&T, which was the State's largest cable provider, did not make significant investment to upgrade its networks and offer broadband services in Florida although access to rights-of-way was not an issue. IAC can only speculate as to why AT&T did not make investments to offer such services. When Comcast acquired AT&T's cable systems in Florida, Comcast found itself in the position of needing to invest in upgrading its networks, and being behind the local ILEC in launching broadband services. Adopting statutes, however, to address rights-of-way issues, however, does not spur investment in infrastructure to deploy advanced services.

[18] *Notice of Inquiry* at 40, ¶ 40.

telecommunications services may have difficulty in securing investment for future deployment. Discussing the role of competition in the further development of telecommunications services and broadband deployment, former Commission Chairman Reed E. Hundt noted

> . . . competition provides exactly what the economists advertise – tremendous advantages for consumers, opportunities for entrepreneurs and new capital to take risk and introduce new technologies, and continued growth in the nation's economy. It is also clear that a competitive sector means that companies can fail, as they do in every competitive economy, and that has happened to many firms in telecommunications. *Some of the failures in this sector are due, it seems, to excessive investing in redundant business models; others to shoddy or even fraudulent practices. Good sense among investors, better corporate governance, and stricter regulation in financial markets are all right and proper remedies for these serious problems.*[19]

Nothing in these comments suggested that the problem of investment in advanced telecommunications services was related to tribal, state or local government management of public rights-of-way.

More to the point, Mr. Hundt testified that deployment of these technologies continues to grow rapidly. "Total U.S. telecommunications revenues grew from $154 billion in 1996 to $242 billion in 2000, and current estimates indicate they will reach $277 billion in 2002, and a staggering $383 billion in 2006."[20]

Mr. Hundt is not alone in his assessment. Mr. Ivan Seidenberg, Chairman and Chief Executive Officer of Verizon Communications, testified before the same Senate Committee during hearings held on May 12, 2004. Describing an explosion of new technologies in the telecommunications industry, he noted that Verizon is a major player in the broadband marketplace.

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[19] *Statement of Reed E. Hundt before the United States Senate Committee on Commerce, Science and Transportation* at 5 (October 1, 2002), http://commerce.senate.gov/hearings/100102hundt.pdf (last accessed May 22, 2004)(emphasis added).

[20] *Id.* at 3.

> *My company invests close to $12 billion in capital every year*, more and more of it to deploy the broadband networks on which the information economy runs: . . . Our strategy is to differentiate our company through investment and innovation: new applications, services and network platforms. We have shown how this dynamic works in our wireless business, which is a technology and quality leader in the industry. It is vital that we be able to do the same in our wireline business by making the huge investments required to transform our copper network around the requirements of the broadband era.[21]

To be sure, Mr. Seidenberg noted that a new framework was needed for the continued development of broadband services and that some state regulations create problems for the industry because they focus on the days of monopolistic telephone services.[22] Yet, these comments seemed to focus on rate regulation and not upon management of rights-of-way. Further, he noted that Verizon operates in a competitive world "characterized by the emergence of large, well-capitalized strategic competitors who are rapidly deploying IP and broadband networks to offer high-speed data, video and voice services in our markets."[23] He complained about Verizon's competition with cable provider Comcast because Comcast can make investment decisions

> in response to customer demand and market opportunity. It can earn a reasonable return on investment, unfettered by sharing obligations or asymmetrical tax burdens. And it can make investment decisions in an environment of reasonable stability, without the uncertainty of ambiguous and changing regulations.[24]

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[21] *Statement of Ivan Seidenberg before the United States Senate Committee on Commerce, Science and Transportation* (May 12, 2004), http://commerce.senate.gov/hearings/051204seidenberf (last accessed May 22, 2004)(emphasis added).

[22] *Id.*

[23] *Id.*

[24] *Id.*

Mr. Seidenberg's reference to ambiguous regulation could not have included tribal, state and local government management of rights-of-way as a barrier to investment since cable companies are already subject to the payment of franchise fees and other contractual agreements[25] for the use and maintenance of public rights-of-way.

In short, the IAC does not believe that any evidence has been presented that bankers and investments companies are not providing capital to the providers of advanced telecommunications services because of tribal, state or local management of rights-of-way. The Commission, then, should not address this issue further.

The IAC is aware that there may be tension between a provider and tribal, state or local governments when a provider undertakes an investment plan and schedule without first considering and outlining the placement of facilities with these governments.[26] Basic information such as the placement of facilities, the appreciation and preservation of historic and sacred sites, the disruption of traffic, and potential damage to streets and rights-of-way are certainly legitimate issues for consideration by these governments.[27] Indeed, the industry recognizes the unique requirements it must meet with each particular project because of topography, historic preservation, and other matters. If is therefore appropriate that before a company finalizes plans for investment in infrastructure, it plan for a complete and open

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[25] *See* 47 U.S.C. § 542.

[26] The comments submitted by AT&T Corp. suggest that two cases in New York somehow mirror the experience of all providers of advanced telecommunications services throughout the country. As suggested by the discussion in this Reply, however, these two cases from one state (New York) are not representative of any national trend. Therefore, this discussion by AT&T is certainly not dispositive. *See Notice of Inquiry*, COMMENTS OF AT&T CORP. at 16-18, (filed May 10, 2004); http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=0454&id_submission_type=CO&start=21&end=30&first_time=N, (last accessed May 24, 2004).

[27] On this point the IAC directs the Commission's attention to the discussion on pp. 17-25, and adopts these Comments of, the U.S. Conference of Mayors. *Notice of Inquiry*, COMMENTS OF THE UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AMERICAN PUBLIC WORKS ASSOCIATON, TEXAS COALITION OF CITIES FOR UTILITY ISSUES, MONTGOMERY COUNTY, MARYLAND, AND THE MOUNT HOOD CABLE REGULATORY COMMISSION, (filed May 10, 2004); http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts (last accessed May 24, 2004).

discussion with the involved tribal, state or local governments so that the provider can address these governments' concerns, without being subject to the pressures or investment and time tables established by others.[28]

The key, though, is that historically sophisticated and interrelated systems for the delivery of electric, water, telecommunications, cable, and broadband services have already been developed without any federal regulation of use of the rights-of-way. Absent convincing proof of wide-spread problems to the contrary, the IAC recommends that the Commission continue to acknowledge that rights-of-way management is a tribal, state or local concern.

CONCLUSION

The IAC recommends that the Commission take no regulatory action at this time with respect to the issues addressed above that were raised in the *Notice of Inquiry*.

Adopted by the IAC on May 14, 2004, and approved by the Chair on May 24, 2004, after consultation with the Committee and the its Subcommittee on Rights-of-Way.

/s/ Jim Dailey
Jim Dailey, Chair
FCC Intergovernmental Advisory Committee

[28] Any suggestion by providers of advanced telecommunications services that only federal regulation of tribal, state and local rights-of-way will assure appropriate investment opportunities is somewhat disingenuous. A similar claim was made by the wireless industry about the siting of cell towers, an issue over which the Commission does have jurisdiction without the limitations contained in 47 U.S.C. § 253(c). In response to allegations by the wireless industry that local government was using cell tower zoning moratoria inappropriately, on August 5, 1998, the LSGAC, the Cellular Telecommunications Industry Association (CTIA), the Personal Communications Industry Association (PCIA), and the American Mobile Telecommunications Association (AMTA)agreed to an informal dispute resolution process for the wireless industry and local governments' to utilize when moratoria may seem to be adversely affecting the siting of wireless telecommunications facilities.

The purpose of the process is to expeditiously resolve disputes in a manner consistent with the interests of all parties. Notwithstanding their concerns over local governments alleged abuse of using certain zoning moratoria for cell tower siting, the IAC is unaware of any examples of the wireless industry availing themselves of the above-referenced agreement.